STATE OF MINNESOTA
IN COURT OF APPEALS
A15-0339

In re the Marriage of: Sandra Winer, petitioner,
Appellant,

vs.

Edward L. Winer,
Respondent.

Filed February 8, 2016
Affirmed in part, reversed in part.
Hooten, Judge

Hennepin County District Court
File No. 27-FA-000190357

Christopher Zewiske, Ormond & Zewiske, Minneapolis, Minnesota (for appellant)

James J. Vedder, Moss & Barnett, P.A., Minneapolis, Minnesota (for respondent)

Considered and decided by Chutich, Presiding Judge; Stauber, Judge; and Hooten, Judge.

U N P U B L I S H E D O P I N I O N

HOOTEN, Judge

Appellant-obligee challenges the termination of respondent-obligor's spousal maintenance obligation, the district court's failure to reserve jurisdiction over the issue of spousal maintenance, the termination of the requirement that respondent-obligor maintain life insurance to secure his spousal maintenance obligation, and the partial denial of her

claim for need-based attorney fees. Because the district court did not abuse its discretion by terminating respondent's spousal maintenance obligation, terminating respondent's obligation to maintain life insurance, and partially denying appellant's claim for attorney fees, we affirm in part. But, because the district court's failure to reserve jurisdiction over the issue of spousal maintenance was based upon an incorrect application of law and was not supported by the record, we reverse in part.

FACTS

On December 29, 1993, a district court judgment and decree dissolved the marriage of appellant Sandra Winer and respondent Edward L. Winer.[1] In its second amended judgment and decree filed on May 31, 1996, the district court ordered that appellant was to receive "permanent spousal maintenance," which was to continue until her "remarriage, the death of either party, or until further [o]rder of th[e] [district] [c]ourt." Respondent was

[1] We note that the district court sealed the file based on the parties' January 1993 stipulation. Parties should generally refrain from including confidential information in their briefs. Minn. R. Civ. App. P. 112.03. A party may seek leave to file a complete and a redacted version of each appellate brief, however, if the inability to discuss confidential information in the briefs "would cause substantial hardship or prevent the fair presentation of a party's argument." Minn. R. Civ. App. P. 112.03 2009 comm. cmt.

Appellant and respondent liberally cite to orders included in appellant's addendum that were filed under seal in the district court. Neither party sought leave to file two versions of the appellate briefs. Because the parties' briefs are not under seal, we are not constrained in disclosing information contained in the briefs. *See* Minn. R. Pub. Access to Recs. of Jud. Branch 4, subd. 1; *see also Coursolle v. EMC Ins. Grp., Inc.*, 794 N.W.2d 652, 655 n.1 (Minn. App. 2011), *review denied* (Minn. Apr. 19, 2011).

The factual statements in this opinion are limited to those that appear in the parties' briefs. We have, however, considered all relevant materials when deciding the issues raised in this appeal.

ordered to maintain life insurance to secure his child support and spousal maintenance obligation.

The second amended judgment and decree further provided that "[a]ny and all pension or profit sharing attributable to the [r]espondent prior to the entry of the [j]udgment and [d]ecree and thereafter shall be considered marital property and subject to division by the parties." In conjunction with the "equitable property division," the district court awarded marital property valued at $615,882.57 to appellant and marital property valued at $653,551.84, less liabilities of $94,184, for a net property award of $559,367.84 to respondent. In addition to other smaller investments and retirement accounts, including one-half of respondent's deferred compensation, appellant's share of the marital property division primarily consisted of $555,226 from the profit sharing and pension plan that respondent had with his employer. After the dissolution, appellant took her share of respondent's profit sharing plan and pension and moved it to a retirement account that she controlled.

Appellant and respondent are now both 72 years old. Ever since the issuance of the second amended judgment and decree, respondent has continued to pay appellant spousal maintenance, with periodic cost-of-living adjustments. By a stipulation and order filed July 24, 2014, appellant's spousal maintenance was reduced to $7,008 per month, commencing on May 1, 2014. Shortly thereafter, respondent, who retired from his employment on December 31, 2014, moved the district court to terminate or reduce his spousal maintenance obligation and terminate or reduce the life insurance he was required to maintain in order to secure his spousal maintenance obligation. By agreement of the

parties, an evidentiary hearing was held before a consensual special magistrate (magistrate). On January 28, 2015, the magistrate terminated respondent's spousal maintenance obligation, terminated respondent's obligation to secure his spousal maintenance obligation with life insurance, and awarded appellant $15,000 in need-based attorney fees. The magistrate determined that appellant no longer needed spousal maintenance because she would be able to meet her monthly expenses by withdrawing income and principal from her retirement account over the remainder of her life expectancy. The magistrate also declined to reserve jurisdiction over spousal maintenance. The district court adopted the findings and conclusions of the magistrate on January 29, 2015. This appeal followed.

D E C I S I O N

I.

While appellant does not challenge the district court's finding that she can currently meet her reasonable monthly expenses, she does argue that the district court abused its discretion by forcing her to liquidate her property award after she spends down the investment return on her property.[2] We construe this to be a challenge to the district court's termination of respondent's spousal maintenance obligation. Spousal maintenance "may be modified upon a showing of one or more of the following, any of which makes the terms unreasonable and unfair: (1) substantially increased or decreased gross income of an

[2] Although the evidentiary hearing was held before the magistrate and the findings of fact and conclusions of law were those of the magistrate, the district court adopted these findings and conclusions of law. Accordingly, throughout this opinion, we will refer to the findings and conclusions as those of the district court.

obligor or obligee; (2) substantially increased or decreased need of an obligor or obligee," or other factors that are not relevant here. Minn. Stat. § 518A.39, subd. 2(a) (Supp. 2015). We review a decision concerning whether to modify a spousal maintenance award for an abuse of discretion. *See Hecker v. Hecker*, 568 N.W.2d 705, 709–10 (Minn. 1997). A district court abuses its discretion regarding maintenance when it makes findings unsupported by the evidence or when it improperly applies the law. *Dobrin v. Dobrin*, 569 N.W.2d 199, 202 & n.3 (Minn. 1997).

Appellant argues that the district court abused its discretion in terminating respondent's spousal maintenance obligation by "amortizing the marital property corpus awarded to her in the dissolution" and finding that she could meet her monthly expenses without assistance. In support of her argument that the district court erred by requiring her to invade, over the course of her life expectancy, the principal of the marital property that was awarded to her, appellant cites to *Lee v. Lee*, 775 N.W.2d 631, 639 (Minn. 2009); *Kiesow v. Kiesow*, 270 Minn. 374, 387, 133 N.W.2d 652, 662 (1965); *Kruschel v. Kruschel*, 419 N.W.2d 119, 121–22 (Minn. App. 1988), *Hanson v. Hanson*, 379 N.W.2d 230, 232 (Minn. App. 1985); *Boom v. Boom*, 367 N.W.2d 536, 538 (Minn. App. 1985), *review denied* (Minn. June 27, 1985); and *Arzt v. Arzt*, 361 N.W.2d 135, 136–37 (Minn. App. 1985). All of these cases support appellant's argument that absent fraud, mistake, newly discovered evidence, or other extraordinary circumstances, the district court does not have authority to modify a marital property division once the time for appeal from the judgment and decree has expired. Indeed, because of the finality of a property distribution under a judgment and decree, neither the obligee nor the obligor is required to invade the principal

of his or her property settlement to meet his or her monthly needs for purposes of determining spousal maintenance. *See Broms v. Broms*, 353 N.W.2d 135, 137–38 (Minn. 1984); *Dougherty v. Dougherty*, 443 N.W.2d 193, 195 (Minn. App. 1989); *Neubauer v. Neubauer*, 433 N.W.2d 456, 461 (Minn. App. 1988), *review denied* (Minn. Mar. 17, 1989); *Kruschel*, 419 N.W.2d at 121–22; *Fink v. Fink*, 366 N.W.2d 340, 342 (Minn. App. 1985).

Undeniably, authority from this line of cases may be relevant to appellant's right to spousal maintenance at a time when she has insufficient funds from her income and post-dissolution increase in property to meet her needs and, as a result, is forced to invade the principal or corpus of the marital property awarded to her at the time of the dissolution. But, the issue of appellant's right to spousal maintenance in the future is unrelated to our review of whether the district court abused its discretion in terminating her spousal maintenance here. Minn. Stat. § 518.552, subd. 2 (2014), sets out factors that a district court must consider when awarding spousal maintenance. "On a motion for modification of maintenance, . . . the [district] court shall apply, in addition to all other relevant factors, the factors for an award of maintenance under section 518.552 *that exist at the time of the motion*." Minn. Stat. § 518A.39, subd. 2(d) (Supp. 2015) (emphasis added). Under this statutory scheme, then, we are required to review the district court's termination of spousal maintenance based on the statutory factors that existed at the time of respondent's motion.

One of the factors to be considered by a district court in its consideration of an award of spousal maintenance is "the financial resources of the party seeking maintenance, including marital property apportioned to the party, and the party's ability to meet needs independently." Minn. Stat. § 518.552, subd. 2(a). Another relevant factor is "the ability

of the spouse from whom maintenance is sought to meet needs while meeting those of the spouse seeking maintenance." *Id.*, subd. 2(g). "Findings of fact concerning spousal maintenance must be upheld unless they are clearly erroneous." *Gessner v. Gessner*, 487 N.W.2d 921, 923 (Minn. App. 1992). A finding of fact is clearly erroneous if it is "against logic and the facts on record." *Putz v. Putz,* 645 N.W.2d 343, 347 (Minn. 2002).

While appellant challenges the termination of respondent's spousal maintenance obligation, the record establishes that she has sufficient income and post-dissolution resources to meet her current reasonable monthly expenses. The parties agree that appellant's reasonable monthly living expenses are currently $6,844 per month, amounting to annual living expenses of approximately $82,128.[3] The district court, using a 4% rate of return, determined that the total investment return of her one-half share of respondent's profit sharing plan and pension should have been $457,708,[4] which would have increased appellant's retirement account, consisting of principal of $555,226 and interest, to $1,012,934. In addition to this post-dissolution investment return on her retirement account, the district court found that appellant is also receiving $45,000 tax-free per year from 2015 to 2017 as her one-half share of respondent's deferred compensation. The district court determined that of this annual amount, $25,200 "may arguably be considered

[3] These expenses are subject to cost-of-living increases but, for ease of calculation and illustration, we will use the approximate unadjusted amount.

[4] In calculating this amount, the district court imputed income to appellant, finding that at the same time she was receiving spousal maintenance to meet her reasonable monthly expenses, she was depleting her retirement account by withdrawing $65,241 for purposes other than her needs. In addition to these withdrawals, appellant, when she turned age 70 1/2, withdrew $31,497 in 2013 as mandated by 26 U.S.C. § 401(a)(9) (2012), but the district court did not include this amount in its imputation of additional income.

as post-decree increase to her income to be utilized for her self-support." In addition, the district court found that appellant is receiving social security income of $15,214 per year, or $1,267.83 per month. The district court also noted that, because of appellant's age, she is required to take mandatory minimum annual distributions from her retirement account. *See* 26 U.S.C. § 401(a)(9) (requiring recipient of retirement account to take minimum distribution based on life expectancy by age 70 1/2).

Based on these findings, it is clear that appellant has sufficient assets to meet her monthly expenses of $6,844. Appellant does not dispute the district court's determination that she needs to utilize the investment return on her retirement account for her self-support. Assuming, as the district court determined, that she is able to earn 4% return on her retirement account, she will be able to further replenish or increase the resources available to her to meet her future monthly needs for several years. Since she has or should have a post-dissolution investment return of $457,708 in the retirement account that is available to her without invading the principal of the retirement account, she currently has more than enough funds to cover any annual deficit. As these calculations illustrate, appellant has sufficient resources to satisfy her reasonable monthly expenses now and for a number of years without having to invade the principal of her property award.

While appellant does not contest the district court's finding regarding her reasonable monthly expenses or argue that she is currently in need of spousal maintenance, she does challenge the district court's findings regarding respondent's current income.[5]

[5] We recognize that, given our conclusion that the district court correctly determined that appellant has no need for spousal maintenance, whether the district court erred in its

Respondent's share of his profit sharing plan and pension accounts, which were valued at $605,226 at the time of the dissolution, had grown to $4 million by the time of the evidentiary hearing. In calculating respondent's income, the district court, as in its determination of appellant's income, applied a 4% rate of return on these accounts, and found that respondent could receive approximately $160,000 per year in interest income. Like appellant, respondent is receiving $45,000 per year from 2015 to 2017 as his share of deferred compensation, as well as social security income of approximately $30,000 annually. Based on these sources of income, the district court found that respondent, at a minimum, has an annual gross income in the amount of $235,000 from 2015 to 2017 while he collects his deferred compensation and $190,000 as interest and social security income thereafter. The district court observed that because there was no evidence of the amount of respondent's post-dissolution contributions to his retirement account, it was unable to determine what portion of the increase of his retirement assets were due to his post-dissolution investment return and what portion was attributable to post-dissolution contributions either by respondent or his employer. While the district court failed to make a specific factual determination of respondent's net income, the findings that were made suggest that, if appellant had been in need of spousal maintenance, respondent would have

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findings regarding respondent's income and monthly expenses is irrelevant to our determination of whether the district court abused its discretion in terminating respondent's spousal maintenance obligation. However, because respondent's ability to pay spousal maintenance is relevant to our discussion of whether the district court erred by declining to reserve jurisdiction over spousal maintenance, we will address appellant's challenges to the district court's findings regarding respondent's income and monthly expenses.

had sufficient means to meet his reasonable monthly expenses and to make spousal maintenance payments to appellant.

Appellant also challenges the district court's findings regarding respondent's reasonable monthly living expenses. At the evidentiary hearing, respondent's financial expert testified that he calculated respondent's current reasonable monthly expenses of $10,888 by using respondent's reasonable monthly living expenses at the time of the second amended judgment and decree and adding cost-of-living adjustments from that time until the present. Appellant argues that this calculation is incorrect because respondent's living expenses at the time of the second amended judgment and decree were temporarily inflated due to his assumption of marital debt. But, there is no showing in the record that appellant ever appealed this finding or that the method of respondent's financial expert in calculating respondent's reasonable monthly expenses was unreasonable. Even if appellant were correct that respondent's monthly expenses are erroneously inflated, it would not make any difference here where respondent has more than sufficient funds to meet his own expenses and pay spousal maintenance to appellant. Given our limited standard of review, which requires deference to the district court's findings of credibility and resolution of conflicting evidence, we conclude that the district court's acceptance of the testimony of respondent's expert regarding respondent's monthly expenses was not clearly erroneous. *See Sefkow v. Sefkow*, 427 N.W.2d 203, 210 (Minn. 1988); *Grant v. Malkerson Sales, Inc.*, 259 Minn. 419, 424–25, 108 N.W.2d 347, 351 (1961) ("[F]indings of fact based on conflicting evidence will not be disturbed on appeal unless manifestly and palpably contrary to the evidence as a whole").

Appellant also argues that because the district court failed to make specific findings regarding respondent's net income and his ability to pay spousal maintenance, we should reverse and remand to the district court for additional findings. Since appellant has no present need for spousal maintenance, there was no need for a specific determination of respondent's net income. *See Lyon v. Lyon*, 439 N.W.2d 18, 22 (Minn. 1989) ("Because maintenance is awarded to meet need, maintenance depends on a showing of need.").

There are sufficient facts in the record to support the district court's findings regarding the parties' reasonable monthly expenses and respondent's partial gross income. Although it would have been preferable for the district court to have made a specific finding that respondent had the ability to pay spousal maintenance, such a conclusion was implicit based upon findings which demonstrated respondent's significant financial resources. Because appellant has no current need for spousal maintenance, she has failed to show that the district court's failure to make specific findings of respondent's net income and ability to pay spousal maintenance prejudiced her. *See Midway Ctr. Assocs. v. Midway Ctr. Inc.*, 306 Minn. 352, 356, 237 N.W.2d 76, 78 (1975) (stating that to prevail on appeal, appellant must show both error and prejudice resulting from error.) Based upon its findings regarding appellant's current needs, her income, and the resources that she obtained post-dissolution, the district did not abuse its discretion in terminating respondent's spousal maintenance obligation.

Appellant also argues that the district court abused its discretion by terminating the requirement that respondent maintain life insurance to secure his spousal maintenance obligation. "The district court has discretion to consider whether the circumstances

justifying an award of maintenance also justify securing it with life insurance." *Kampf v. Kampf*, 732 N.W.2d 630, 635 (Minn. App. 2007) (quotation omitted), *review denied* (Minn. Aug. 21, 2007). Because we agree with the district court's termination of spousal maintenance, we conclude that the district court did not abuse its discretion by terminating respondent's obligation to maintain life insurance to secure his spousal maintenance obligation.

II.

Appellant argues that the district court erred by not reserving jurisdiction over future spousal maintenance on the grounds that appellant was able to meet her monthly expenses by invading the principal of her retirement account throughout her life expectancy. A district court "may reserve jurisdiction of the issue of maintenance for determination at a later date." Minn. Stat. § 518A.27, subd. 1 (2014). "Reservation allows the [district] court to later assess and address future changes in one party's situation as those changes arise, without prematurely burdening the other party." *Prahl v. Prahl*, 627 N.W.2d 698, 703 (Minn. App. 2001). If a district court terminates an existing spousal maintenance award and does not reserve jurisdiction, jurisdiction is lost. *Berger v. Berger*, 308 Minn. 426, 428, 242 N.W.2d 836, 837 (1976). "Whether to reserve jurisdiction over the issue of maintenance is within the district court's discretion." *Prahl*, 627 N.W.2d at 703. "[U]nder some circumstances it is reversible error not to reserve jurisdiction to award [spousal maintenance] at some future time." *Berger*, 308 Minn. at 428, 242 N.W.2d at 837.

Appellant argues that by failing to reserve jurisdiction of the issue of spousal maintenance, the district court is effectively forcing her to liquidate, over the course of her

life expectancy, the assets that she acquired as part of the parties' equitable property division. While acknowledging the general principle that spouses are not required to invade the principal or corpus of marital property awarded in the dissolution to meet their monthly needs, the district court nonetheless concluded that retirement accounts awarded as part of the division of marital property should be treated differently than other marital property. The district court reasoned that if appellant is not required to utilize the original $555,226 of principal in her retirement account over her remaining life expectancy, then her retirement account would not be used for her self-support. The district court stated that "[s]uch a result defies logic and defies the very purpose of retirement assets by their nature, to support a person during their retirement years." Neither the district court nor respondent is able to cite to any binding precedent that supports the creation of this exception to the well-established rule that "spouses are not required to invade the principal of their property settlement to meet their monthly needs." *Dougherty*, 443 N.W.2d at 195; *see also Lee*, 775 N.W.2d at 640 n.1 ("[W]hen considering the property awarded to a spouse seeking maintenance, we have looked at the income generated from that property, and not required the obligee spouse to invade the principal of the property to pay living expenses."); *Fink*, 366 N.W.2d at 342 ("Courts normally do not expect spouses to invade the principal of their investments to satisfy their monthly financial needs.").

The Minnesota Supreme Court has addressed the issue of utilizing retirement benefits awarded in the marital property division for purposes of spousal maintenance, albeit from the perspective of the spousal maintenance obligor. In *Lee*, the supreme court began its analysis by noting that the statute governing modification of spousal maintenance

orders warns that "all divisions of real and personal property provided by section 518.58 shall be final, and may be revoked or modified only where the court finds the existence of conditions that justify reopening a judgment under the laws of this state, including motions under section 518.145, subdivision 2." 775 N.W.2d at 639–40 (quoting Minn. Stat. § 518A.39, subd. 2(f) (2008)). The *Lee* court therefore concluded that "absent mistake, fraud, newly discovered evidence, or other extraordinary circumstances, *see* Minn. Stat. § 518.145, subd. 2 (2008), courts may not upset the division of marital property made at dissolution in the course of modifying a maintenance order." *Id.* at 640.

The *Lee* court next addressed the issue of considering pension benefits awarded to the obligor as property and concluded that "including marital pension benefits previously awarded as property in [the obligor's] income would potentially increase the total amount of [the obligor's] maintenance obligation." *Id.* The supreme court determined that this would be "akin to putting money into [the obligor's] left pocket while simultaneously removing money from his right pocket, in effect modifying the prior property division without finding the existence of the factors set forth in Minn. Stat. § 518.145, subd. 2." *Id.* The supreme court therefore concluded that the district court was correct not to consider the pension previously awarded to the obligor as marital property in calculating his income. *Id.*

The district court in *Lee* included in the obligee's income pension benefits awarded to her as marital property, but the supreme court did not analyze this issue on appeal because the obligee did not challenge the ruling. *Id.* at 640 n.10. The supreme court, however, cautioned:

> With respect to the party seeking maintenance, courts are instructed to consider marital property apportioned to the party. However, when considering the property awarded to a spouse seeking maintenance, we have looked at the income generated from that property, and not required the obligee spouse to invade the principal of the property to pay living expenses. Because [the obligee] raised no issue regarding the inclusion of the pension payments in her income, we need not discuss the issue further.

Id. (quotation and citations omitted). Here, the district court acknowledged the *Lee* decision, but distinguished it because *Lee* did not address whether an obligee is required to use retirement assets from a property award for her self-support during retirement.

Appellant argues that based upon this caselaw and the facts of this case, the district court improperly applied the law by concluding that she could meet her monthly expenses for the remainder of her life expectancy by invading the principal of the retirement benefits awarded to her as marital property. We agree. Our precedent mandates that "spouses are not required to invade the principal of their property settlement to meet their monthly needs." *Dougherty*, 443 N.W.2d at 195 (making this statement in the context of discussing a maintenance recipient's property award). As the supreme court noted in *Lee*, courts have looked at the income generated from property awarded to a spousal maintenance obligee and have not required the obligee to invade the principal of her property award to meet her monthly needs. 775 N.W.2d at 640 n.10. *See also Nardini v. Nardini*, 414 N.W.2d 184, 198 (Minn. 1987); *Broms*, 353 N.W.2d at 138; *Dougherty*, 443 N.W.2d at 195; *Fink*, 366 N.W.2d at 342. As an error-correcting court, we are not in a position to overturn established supreme court precedent. *Brainerd Daily Dispatch v. Dehen*, 693 N.W.2d 435, 439–40 (Minn. App. 2005), *review denied* (Minn. June 14, 2005).

Also, as appellant argues, the failure of the district court to reserve maintenance constitutes an unauthorized modification of the property division made in the second amended judgment and decree. The $555,226 awarded to appellant was explicitly awarded as part of the "equitable property division" in the judgment and decree. There was no indication in the judgment and decree that the principal in the retirement account that was awarded as property was to be utilized as future income to offset the need for spousal maintenance during retirement, even though, if that were the intent of the parties or the district court, that could have been easily included in the judgment and decree. By requiring appellant to utilize the principal of this award to meet her monthly needs, the district court, upon respondent's motion to terminate or reduce spousal maintenance, essentially "upset the division of marital property made at dissolution in the course of modifying a maintenance order," which the law prohibits. *See id.* at 640 (making this statement in the context of discussing marital property awarded to a maintenance obligor).

In addition to the lack of binding precedent supporting the creation of an exception to the general rule that neither the obligee nor the obligor has to invade the principal or corpus of his or her marital property, there are a number of other reasons why the adoption of such a new rule would be unreasonable. First, it is unclear why retirement accounts awarded as property should be treated differently than other income-producing assets awarded as property in a marital dissolution. This case involved a defined contribution plan, which has been described as "an individual account for each employee participant, with retirement benefits based on the amount contributed to the account and any income, expenses, gains, or losses to the account." *Id.* at 644 (Dietzen, J., concurring). "A 401k

retirement plan is an example of a defined contribution plan in which employer and employee have the opportunity to contribute amounts into an individual account for the benefit of the employee." *Id.* Upon retirement, the contributions and the interest earned on those contributions are available to the employee. *Id.* Since the monies in a defined contribution plan are not available until retirement, at least without an early withdrawal penalty, any income earned on the account cannot be utilized in the calculation of an obligee's income or in the determination of an obligor's income and ability to pay spousal maintenance until retirement.

In creating an exception for defined contribution plans to the general rule that neither the obligee nor the obligor has to invade the principal or corpus of the marital property, the district court failed to point out a meaningful rationale for differentiating between a cash settlement, such as in *Broms*, 353 N.W.2d at 137–38, and a defined contribution plan, both of which could potentially meet the monthly living expenses of an obligee upon retirement. Yet, under *Broms*, if appellant had been awarded an equivalent cash settlement upon dissolution, rather than a retirement account, she would not be required to invade the principal of the cash settlement awarded as part of the division of marital property. The primary distinction between these two types of marital assets is that in the case of a cash settlement, the interest earned can be immediately considered as income to the obligee, whereas, in a defined contribution plan, the investment return and interest on the retirement account cannot be considered as income for income tax purposes until funds are withdrawn from the account upon retirement. The deferred income tax benefits of a defined contribution plan, as opposed to the immediate income tax

ramifications of interest income in a savings account, do not provide a meaningful difference in the two types of assets that would justify the creation of an exception to the general rule.

Second, we observe that the adoption of such an exception would be unfair to appellant. If appellant is forced to utilize the principal of her retirement account and outlives her life expectancy, she will be forced to live solely on her social security income, even though respondent appears to have sufficient income and resources to pay spousal maintenance now and into the future. Because we refuse to adopt this exception, however, in the event that respondent predeceases appellant and is thus no longer a spousal maintenance obligor, the principal of appellant's retirement account will have been preserved and, if necessary, will be available for her to draw upon for her self-support.

Third, the adoption of this exception could potentially make property division more difficult for future parties in spousal maintenance cases. If we were to adopt this new exception to the general rule, we would be creating a disincentive for obligees to take a share of retirement accounts as marital property when they can request other marital property that is not subject to invasion. This may make settlements regarding the division of marital property more difficult for both parties, since obligors may need immediately accessible income-producing assets in order to pay monthly expenses, rather than retirement accounts. Obligees, on the other hand, may be reluctant to take retirement accounts as marital assets that are subject to invasion over marital assets that are protected from invasion because the protected marital assets would not be included in the obligee's income and would be available for purposes other than the payment of monthly expenses.

Finally, we question the wisdom of adopting an exception to the general rule that neither the obligee nor the obligor has to invade the principal or corpus of the marital property because here it is speculative whether appellant will ever deplete the investment return and interest income available for her self-support and need to either receive spousal maintenance or invade the principal of her retirement account. In fact, the only reason that this issue even became relevant in this case is because the district court declined to reserve spousal maintenance on the basis appellant would have sufficient funds in her retirement account, assuming that she invaded the principal, for her life expectancy.

We agree with the district court that the purpose of retirement accounts is to provide support for a person during retirement. However, within the context of determining spousal maintenance, the expectation is that the obligee will be required to utilize the investment return and interest on his or her retirement assets for monthly expenses, not invade the principal related to the marital property division for payment of such expenses. If, on the other hand, the obligee chooses to utilize such income resources or to invade the principal of the accounts for purposes other than the payment of reasonable monthly expenses, a district court may impute income to the obligee to approximate the return the obligee could have realized, as the district court did here. In this way, while the obligee may not be forced to invade the principal of a retirement account to meet his or her monthly expenses, neither may the obligee utilize the account for non-support purposes and expect a larger spousal maintenance award because of the smaller investment return or interest income on the account.

Because, for the purposes of determining spousal maintenance, appellant cannot be required to utilize the original $555,226 of principal to meet her monthly needs, the district court improperly applied the law and therefore abused its discretion by concluding that there is no apparent uncertainty about appellant's lack of need for future spousal maintenance that would merit the reservation of jurisdiction. Accordingly, because appellant may need spousal maintenance in the future once her investment return and interest income on her retirement account is depleted, we reverse and remand for the district court to reserve jurisdiction over spousal maintenance.

III.

Appellant argues that the district court abused its discretion by awarding her only $15,000 in need-based attorney fees when she requested $20,000. A district court shall award need-based attorney fees if it finds that the fees are necessary for the good faith assertion of the requesting party's rights, that the party from whom attorney fees are sought has the means to pay them, and that the requesting party does not have the means to pay them. Minn. Stat. § 518.14, subd. 1 (2014). The Minnesota Supreme Court has stated that appellate courts review an award of attorney fees for an abuse of discretion. *Gully v. Gully*, 599 N.W.2d 814, 825 (Minn. 1999). *But see Geske v. Marcolina*, 624 N.W.2d 813, 816 n.1 (Minn. App. 2001) (noting a tension in supreme court caselaw regarding whether an attorney fee award under Minn. Stat. § 518.14, subd. 1, is mandatory or discretionary).

The district court found that appellant withdrew $31,497 from her retirement account, used $25,000 of this amount to pay a portion of the $45,000 in attorney fees that she had incurred, and deposited the balance of $6,497 into her savings account. Appellant

argues that the district court abused its discretion in only awarding her $15,000 in attorney fees because the difference between what she paid ($25,000) and the attorney fees ($45,000) is $20,000. In consideration of the fact that she had another $6,497 available to her for the payment of attorney fees and needed only an additional $13,503 to pay the outstanding attorney fee balance, the district court did not abuse its discretion by awarding appellant $15,000 in attorney fees.

Affirmed in part, reversed in part.